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In The

Supreme Court of the United States

No. 78-1602

J. D. COX, SUPERINTENDENT OF VIRGINIA STATE PENITENTIARY,

Petitioner,

v.

EDWARD G. GARLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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RESPONSE NOT PRINTED

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v.

EDWARD G. GARLAND,

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PETITION FOR A WRIT OF CERTIORARI to the UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Superintendent of the Virginia State Penitentiary, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on January 16, 1973, rehearing denied March 1, 1973.

OPINION BELOW

The opinion of the Court of Appeals below is reported at 472 F.2d 875 (1973) (Appendix A). The opinion of the United States District Court below is reported at 311 F.Supp. 1290 (W.D. Va. 1970) (Appendix B). The order denying a petition for rehearing en banc without an opinion was not reported (Appendix C).

JURISDICTION

The judgment of the Court of Appeals was entered on January 16, 1973, and the order denying a petition for rehearing and a suggestion for reconsideration en banc was entered on March 1, 1973. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether In Cases Of Late Appointment Of Counsel, The United States Court Of Appeals For The Fourth Circuit Is In Error For Continued Employment Of A Presumption Of Ineffective Assistance Of Counsel, Or Prejudice Per Se, Standard?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

STATUTES INVOLVED

28 U.S.C. § 2254

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

Code of Virginia (1950), as amended, § 8-596

". . . (a) The writ of habeas corpus *ad subjiciendum* shall be granted forthwith by any circuit court or corpora-

tion court, or any judge of either in vacation, to any person who shall apply for the same by petition, showing by affidavits or other evidence with probable cause to believe that he is detained without lawful authority."

STATEMENT OF THE CASE

On November 14, 1955, Edward Garland appeared in the Circuit Court of the City of Waynesboro, Virginia, to be tried on six counts of forgery. The Circuit Court then appointed counsel and Garland and counsel conferred for fifteen to twenty minutes. Counsel advised Garland to plead guilty to five counts, not guilty to one, and to waive his right to a jury trial. Upon doing as advised, Garland was convicted of the five counts of forgery to which he had entered guilty pleas and he was acquitted on the one count to which he had pleaded not guilty. He was sentenced to five consecutive two-year terms in the Virginia State Penitentiary.

Garland fully served the sentences for the forgery convictions, however, he had two other unrelated convictions which together with the forgery convictions formed the basis of a 1963 recidivist conviction that ultimately resulted in his present incarceration. He was given a sentence of ten years imprisonment, with nine years suspended.

Upon being discharged from prison in 1964, Garland sustained still another conviction in 1965 resulting in the revocation of the nine years suspended in the 1963 recidivist conviction. A petition for writ of habeas corpus was filed on May 28, 1968, in the Circuit Court for the City of Waynesboro, Virginia, attacking the 1955 forgery convictions by alleging ineffective assistance of counsel due to the fact that his attorney had been appointed on the day of trial. The attorney who represented Garland in 1955 died in

August, 1968, at the age of 49, prior to the state plenary hearing, thereby making it impossible to get the full story of the attorney's participation. The petition was dismissed by the Waynesboro Circuit Court, and on December 3, 1969, the dismissal was affirmed by the Supreme Court of Virginia.

After exhausting all state remedies, Garland filed in the United States District Court for the Eastern District of Virginia a federal petition for writ of habeas corpus which was transferred to the United States District Court for the Western District of Virginia by order filed March 6, 1970. The petition alleging ineffective assistance of counsel was dismissed on April 29, 1970, whereupon Garland appealed the United States Court of Appeals for the Fourth Circuit. After briefing and oral argument, the Fourth Circuit reversed the District Court's decision on January 16, 1973, and denied a petition for rehearing and suggestion for reconsideration en banc on March 1, 1973.

REASONS FOR GRANTING WRIT

The Continued Employment By The United States Court Of Appeals For The Fourth Circuit Of Its Doctrine Of Presumption Of Ineffective Assistance Of Counsel In Cases Of Late Appointment Of Counsel Is In Effect A "Per Se" Rule That Conflicts With Prior Ruling Of This Court As Well As With The Rules Employed By Other Federal Circuit Courts.

I.

Conflict With Prior Rule Of This Court

In *Chambers* v. *Maroney*, 399 U.S. 42, 54, 90 S.Ct. 1975, 26 L. Ed.2d 419, 430 (1970), this Court said:

> "Unquestionably, the courts should make every effort to affect early appointments of counsel in all cases. But

> we are not disposed to fashion a per se rule requiring reversal of every conviction following tardy appointment of counsel or to hold that, when ever a habeas corpus petition alleges a belated appointment, an evidentiary hearing must be held to determine whether the defendant has been denied his constitutional right to counsel."

In the instant case, upon reviewing the decision in *Chambers*, the Fourth Circuit denies it instituted a "per se" rule by way of the doctrine promulgated in the cases of *Twiford* v. *Peyton*, 372 F.2d 670 (4th Cir. 1967) and *Fields* v. *Peyton*, 375 F.2d 624 (1970) wherein it held that same day appointment of counsel is "inherently prejudicial" and "constitutes a prima facie case of denial of effective assistance of counsel" to the point that the usual burden upon the defendant to prove prejudice is shifted to the state so that it must prove absence of prejudice. The language of this Court in *Chambers*, says the Fourth Circuit, "permits adoption of either a presumption or a totality of the circumstances approach", and that the Twiford-Fields doctrine "is merely a procedural device dictating a particular result only in the absence of contradictory evidence." We disagree.

The facts of the instant case show clearly how put upon and disadvantaged the state is where considerable time has elapsed since the case was tried and where the attorney in question has passed away. Under the burden of having to rebut a "per se" presumption of prejudice where the testimony of court appointed counsel is impossible to obtain, the state is in the awful position of having to suffer reversals in cases where defendants have shown no prejudice to themselves by having plead guilty. No matter how great the state's resources, it cannot bring back the dead. As a matter

of consideration, in light of the recent numerical explosion in the number of habeas corpus and prisoner complaint suits with which the state has had to deal, court appointed counsel have appeared to be in better positions to investigate the facts than has the state.

We fail to see how the absence of a presumption of prejudice rule would "be closing all avenues of appeal to the petitioner". The petitioner certainly would have all the avenues of appeal that he normally would have in raising any other habeas corpus issue. Once a *petitioner* has established a prima facie case, the burden shifts to the state anyway. In *Johnson* v. *Zerbst,* 304 U.S. 458, 468, 58 S.Ct. 1019, 82 L. Ed. 1461, 1468 (1938), Justice Black said:

> "It must be remembered, however, that a judgment cannot be lightly set aside by collateral attack, even on *habeas corpus.* When collaterally attacked, the judgment of a Court carries with it a presumption of regularity. Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of *habeas corpus,* the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of counsel. If in a *habeas corpus* hearing, he does meet this burden and convinces the Court by a preponderance of evidence that he neither had counsel nor properly waived his constitutional right to counsel, it is the duty of the Court to grant the writ."

See *Developments in the Law—Federal Habeas Corpus,* 83 Harv.L.Rev. 1038, 1140-1145 (1970).

In *Davis* v. *Peyton,* 211 Va. 525, 528, 178 S.E.2d 679, 681, a case involving the death of counsel prior to a state plenary hearing, the Virginia Supreme Court expressed its doubt as to the survival of the Fourth Circuit's presump-

tion of prejudice doctrine in light of the language in *Chambers* v. *Maroney, supra.* We continue to fail to see how the doctrine can remain viable.

II.

Conflicts With Other Circuits

Following the handing down of this Court's decision in *Chambers* v. *Maroney, supra,* the U. S. Court of Appeals for the Third Circuit expressly overruled, to the extent that it had adopted the presumption doctrine, the case of *United States Ex Rel Mathis* v. *Rundle,* 394 F.2d 748 (3rd Cir. 1968). The *Mathis* standards had been expressly obtained "following the lead of the Fourth Circuit" in *Fields* v. *Peyton, supra,* and *Twiford* v. *Peyton, supra.* Although it indicated concern about the question of late appointment of counsel, the Third Circuit said:

> "We therefore overrule Mathis to the extent it adopted the presumption doctrine. In doing so, we do not intend to minimize the strong inference of prejudice from failure to appoint counsel until the day of trial or very shortly prior thereto."

It is clear that the Third Circuit acted to bring itself in line with this Court's holding in *Chambers.*

The First Circuit has also indicated deep concern about the practice of late appointment of counsel, but it recognized that the amount of time required for adequate preparation can widely vary, and noted that the Fourth Circuit's presumption seemed especially motivated by a "desire for a therapeutic rule suggested by its prior experience with state courts' late appointment of counsel". *Rastrom* v. *Robbins,* 440 F. 2d 1251 (1971). The First Circuit emphasized that

it was "not willing to corset [the Fourth Circuit's] attitude in a standard applicable to all cases".

The Fifth Circuit uses a "particular circumstances" standard relative to the question of late appointment of counsel. In *Mosley* v. *Dutton,* 367 F.2d 913 (1966), cert. den., 387 U.S. 942, 87 S.Ct. 2074, 18 L.Ed.2d 1328 (1967), the Fifth Circuit said:

> "Whether the applicant has been denied the benefit of assistance of counsel guaranteed to him by the Fourteenth Amendment depends upon 'the particular circumstances' appearing in the record."

The Sixth Circuit has continued to adhere to its "totality of the circumstances" approach to the issue and has declined to institute a per se rule:

> "It is re-emphasized that no absolute rule can be enunciated as the minimum amount of time required for adequate preparation of a criminal case with respect to either guilty plea cases or trials on pleas of not guilty. The question of whether prejudice has occurred and whether the trial judge had abused his discretion in denying a continuance must be determined by a consideration of all the facts and circumstances of each case." *United States* v. *Knight,* 443 F.2d 174, 177 (1971).

Unlike the Fourth Circuit, none of these other circuits is willing, despite an obvious concern for the problem, to corset a presumption in a stringent "per se" rule. Neither this Court nor the Circuit Courts appear willing to saddle the state with so onerous a burden when the question of effective assistance of counsel can so well be determined through a "totality of the circumstances" approach. The Fourth Circuit should be reversed and the order and opinion of the District Court affirmed.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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RENO S. HARP, III
Deputy Attorney General

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Richmond, Virginia 23219

PROOF OF SERVICE

I, Reno S. Harp, III, counsel for petitioner herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 30th day of May, 1973, I mailed a copy of the foregoing Petition for a Writ of Certiorari to Edward L. Hogshire, Esquire, 1908-A Lewis Mountain Road, Charlottesville, Virginia 22903, counsel of record for respondent, and to Edward G. Garland, respondent, Virginia State Penitentiary, 500 Spring Street, Richmond, Virginia 23219, by prepaid postage.

RENO S. HARP, III
Deputy Attorney General

APPENDIX

APPENDIX A

Edward G. GARLAND, Appellant,

v.

J. D. COX, Superintendent Virginia State Penitentiary, Appellee.

No. 14820.

United States Court of Appeals, Fourth Circuit.

Argued Sept. 15, 1972.

Decided Jan. 16, 1973.

Habeas corpus proceeding by state prisoner. The United States District Court for the Western District of Virginia, at Harrisonburg, Ted Dalton, Chief Judge, 311 F.Supp. 1290, dismissed petition, and prisoner appealed. The Court of Appeals, Sobeloff, Senior Circuit Judge, held that although state prisoner's claim of ineffective representation of counsel was not presented until approximately 13 years after conviction and after death of counsel, petitioner did not unreasonably or unjustifiably delay making this claim, where claim was filed three months before counsel's untimely death, where petitioner's suspended sentence was not revoked until approximately three years before petitioner asserted claim, and where decisions which changed law with respect to burden of persuasion were not rendered until approximately one year before petitioner asserted claim. The Court further held that where a petitioner demonstrates late appointment of counsel, the Court will continue to employ presumption of ineffective assistance of counsel, remembering that it is merely a procedural device dictating a particular result only in the absence of contradictory evidence, and

the moment that contravening evidence is presented from any source, the presumption vanishes completely, as if it had never existed.

Reversed.

1. Habeas Corpus—50

Although state prisoner's claim of ineffective representation of counsel was not presented until approximately 13 years after conviction and after death of counsel, petitioner did not unreasonably or unjustifiably delay making this claim, where claim was filed three months before counsel's untimely death, where petitioner's suspended sentence was not revoked until approximately three years before petitioner asserted claim, and where decisions which changed law with respect to burden of persuasion were not rendered until approximately one year before petitioner asserted claim. U.S.C. A. Const. Amend. 6.

2. Habeas Corpus—85.1(3)

Where a petitioner demonstrates late appointment of counsel, the Court of Appeals for the Fourth Circuit will continue to employ presumption of ineffective assistance of counsel, remembering that it is merely a procedural device dictating a particular result only in the absence of contradictory evidence, and the moment that contravening evidence is presented from any source, the presumption vanishes completely, as if it had never existed. U.S.C.A. Const. Amend. 6.

Edward L. Hogshire, Washington, D. C., for appellant.

William A. Carter, III, Asst. Atty. Gen. (Andrew P. Miller, Atty. Gen., William P. Robinson, Jr., Asst. Atty. Gen., on brief), for appellee.

Before SOBELOFF, Senior Circuit Judge, WINTER, Circuit Judge, and THOMSEN, Senior District Judge.

SOBELOFF, Senior Circuit Judge:

Edward G. Garland, a Virginia prisoner, seeks a certificate of probable cause to appeal from an order of the District Court, 311 F.Supp. 1290, dismissing his petition for a writ of habeas corpus. We grant the certificate, and reverse.

It is uncontested that counsel was not appointed to represent Garland until the day of his trial. In the past, we have held that such late appointment of counsel is inherently prejudicial, and "constitutes a prima facie case of denial of effective assistance of counsel, so that the burden of proving lack of prejudice is shifted to the state." Twiford v. Peyton, 372 F.2d 670, 673 (4 Cir. 1967). Stokes v. Peyton, 437 F.2d 131 (4 Cir. 1970); Fields v. Peyton, 375 F.2d 624 (4 Cir. 1970). The State of Virginia, however, urges this court to retreat from this rule of presumptive prejudice wherever there has been a showing of late appointment of counsel, and to look instead to the "totality of the circumstances." *See* Moore v. United States, 432 F.2d 730 (3 Cir. 1970); Rastrom v. Robbins, 440 F.2d 1251 (1 Cir. 1971). The state also contends that Garland unreasonably and unjustifiably delayed raising his claim of ineffective representation of counsel to its material prejudice, and that under such circumstances the doctrine shifting the burden of proof of prejudice to the state should not be applied.

I.

Garland appeared for trial on November 14, 1955, in the Circuit Court of the City of Waynesboro, Virginia, charged with six counts of forgery. Counsel was then appointed and

conferred with the defendant for fifteen to twenty minutes. He advised Garland to plead not guilty to one count, guilty to the other five, and to waive his right to a jury trial; all of which the defendant did. As a consequence, Garland was convicted of five counts of forgery on his guilty pleas and sentenced to five consecutive two-year terms of imprisonment.

Petitioner fully served the sentences imposed on him for the forgery convictions, which, together with two other convictions not now in issue, formed the basis of a 1963 recidivist conviction—the cause of his present confinement. He was sentenced to ten years' imprisonment, nine of which were suspended.

After being discharged from prison in 1964, Garland was convicted of yet another charge in 1965, and the suspension of nine years on the recidivist conviction was revoked. On May 28, 1968, he filed a petition for a writ of habeas corpus in the Circuit Court for the City of Waynesboro, attacking the 1955 forgery convictions, alleging ineffective assistance from his counsel due to the attorney's appointment on the day of trial. Subsequently, in August, 1968, prior to the initial habeas hearing, the counsel who had represented Garland in 1955 died at the age of forty-nine, thus rendering it an impossible task to detail the attorney's participation. After exhausting all state remedies, Garland filed a federal petition for a writ of habeas corpus on March 6, 1970.

The District Court, per Judge Dalton, while recognizing the applicability of *Twiford* and *Fields*, nonetheless dismissed the petition, stating:

> An unreasonable and unjustified delay by a petitioner in making a claim may not be used to the disadvantage of the state. See Wade v. Peyton, 378 F.2d 50 (4 Cir. 1967). The present claim was not presented until almost

> 15 years after the conviction, and after the death of petitioner's counsel. It is clear that the state has been prejudiced with regard to petitioner's delay in making this claim—its chance for effective rebuttal evidence died with petitioner's counsel.

All parties agree that the lower court's reliance on Wade v. Peyton was misplaced as that case was decided on the issue of exhaustion. See Appellee's Brief at p. 4. Nevertheless, the state argues that Garland unreasonably delayed for thirteen years raising the issue of late appointment of counsel, and that now as a result of trial counsel's death, it will be unable to rebut the presumption that ineffective assistance of counsel was rendered. Under these limited circumstances, the state contends the burden of persuasion on the issue of prejudice should remain with the defendant.

A careful examination of the chronology and circumstances of this case leads us to the conclusion that Garland did not unreasonably or unjustifiably delay making a claim of ineffective assistance of counsel. The claim was filed three months before trial counsel's untimely death at a young age, forty-nine years. It is this death which the state maintains has foreclosed its ability to prove that Garland was adequately represented at trial.

[1] Furthermore, Garland's delay in presenting his claim was reasonable both in light of the fact that his suspended sentence was not revoked until December 22, 1965, and the fact that the decisions in *Twiford* and *Fields,* which can be characterized as changes in the law, were not rendered until February 6, 1967, and March 7, 1967. Garland began habeas proceedings in May, 1968—certainly within a reasonable period following the decisions. The Supreme Court has said that an intervening change of law is sufficient justification for failing to raise a claim, even if the failure to raise the point occurred in a prior habeas hearing. "If

purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application." Sanders v. United States, 373 U.S. 1, 17, 83 S.Ct. 1068, 1078,10 L.Ed.2d 148 (1962).

II.

The state makes a broader attack against the rule prevailing in this circuit that where the record reveals inadequate preparation time due to late appointment of counsel, the burden of proving that the defendant was not thereby prejudiced shifts to the state. The suggestion is proffered that we rethink the *Twiford-Fields* doctrine in light of recent judicial developments. *See* Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); Moore v. United States, 432 F.2d 730 (3 Cir. 1970); Rastrom v. Robbins, 440 F.2d 1251 (1 Cir. 1971).

Reviewing these decisions we are not inclined to alter the rule we promulgated in *Twiford* and *Fields*. The Supreme Court in Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), left undisturbed a Third Circuit rule similar to the one we follow. In the course of the lengthy opinion, the Court declared:

> Unquestionably, the courts should make every effort to effect early appointments of counsel in all cases. But we are not disposed to fashion a *per se* rule requiring reversal of every conviction following tardy appointment of counsel or to hold that, whenever a habeas petition alleges a belated appointment, an evidentiary hearing must be held to determine whether the defendant has been denied his constitutional right to counsel. 399 U.S. at 54, 90 S.Ct. at 1982.

The language of the Court permits adoption of either a presumption or a totality of the circumstances approach. Certainly this circuit's rule placing upon the state the burden of providing evidence that a defendant was not prejudiced by a tardy appointment of counsel is not at odds with the Supreme Court's stricture in *Chambers*. Establishing a presumption that late appointment results in ineffective assistance of counsel does not automatically mandate any particular result; nor does it dictate an evidentiary hearing every time late appointment is alleged. The doctrine of *Twiford-Fields* is not "a *per se* rule requiring the reversal of every conviction following the late appointment of counsel." It is an evidentiary rule, affecting the distribution of the burden of persuasion between two parties. *See* McCormick on Evidence, § 343 (2d ed. 1972). *See also* Wigmore on Evidence, §§ 2483, 2485-2487, 2489-2493 (3rd ed. 1940).

Since either approach, presumption of prejudice or totality of the circumstances, is constitutionally acceptable, we must determine which in our view best serves our notions of justice and fair play. In adopting the totality of the circumstances approach, the Third Circuit stated in Moore v. United States, 432 F.2d 730 (3 Cir. 1970) that since late appointments were no longer a problem in the circuit a prophylactic rule was no longer needed. It was preferable, the court declared, to decide on a case by case basis the factual question of whether the defendant received adequate assistance of counsel from the totality of the circumstances. The Third Circuit, however, still retains a presumption—only it is recast into one favoring the state over the defendant. "If it be said that [it] will cast the burden of proof on the defendant, the answer is that [*the totality of the circumstances approach*] *applies to the lawyer the presumption of the regularity of his conduct* and that . . . one who claims his counsel had inadequately rep-

resented him should have the burden of proving the charge." *Moore, supra,* at 735. (Emphasis added.) The Third Circuit envisions an inquiry into the ability, experience and zeal with which counsel acted, both at the trial and in preparation—in other words, an evaluation of the services rendered to the client. But this type of inquiry accompanied by the presumption of regularity that is accorded prior judicial proceedings works a hardship on a class of petitioners, such as Garland, who, through no fault of their own, are prevented from rebutting the presumption established by the Third Circuit. Where counsel and records are no longer available, as in Garland's case, the defendant, as a practical matter, would be foreclosed from challenging the adequacy of the presentation received, regardless of shortness of preparation time.

Most recently, the First Circuit also adopted a totality of the circumstances test. Rastrom v. Robbins, 440 F.2d 1251 (1971). In *Rastrom,* Judge Coffin pointed out that *Fields* and *Twiford* both involved evidence of prejudice beyond the mere shortage of preparation time. Thus, he minimized the substantive difference between the approaches of circuits. Any remaining variance in these theories, he wrote, "may best be described as attitudinal," there being "a lower threshold of tolerance toward stringently limited preparation time" in the Fourth Circuit. *Rastrom, supra,* at 1253.

Judge Coffin is correct in observing that in Fourth Circuit late appointment cases other evidence of prejudice existed in addition to mere shortage of preparation time. It is our belief that these other deficiencies of trial counsel are not independent of the circumstances of late appointment of counsel but rather emanations therefrom. In *Twiford,* for example, there were defense witnesses who were not located because of a paucity of time—caused by a late appointment.

Just as a pattern of concentric circlets emanates outward from a pebble dropped in a pool of water, a variety of shortcomings seems to radiate from appointment of counsel not made until the day of trial. One is the source of the other. It is this observed relationship between late appointment and ineffective representation upon which our presumption rule is chiefly bottomed.

The most important consideration in the creation of presumptions is probability. McCormick, *supra,* § 343. Evidentiary presumptions exist because the establishment of an intermediate fact more probably than not establishes the ultimate fact, and the intermediate fact is more capable of proof. McCormick, *supra.* In a situation where the ultimate fact—the question of adequacy of counsel—is difficult to prove, but the intermediate fact—late appointment of counsel—is established, we hold that it is appropriate to presume ineffective assistance of counsel. This presumption is not irrebuttable; it compels the conclusion that ineffective assistance of counsel was rendered only in the absence of evidence to the contrary. As soon as this calculus is altered and the state adduces evidence to the contrary, the presumption disappears as a rule of law. Wigmore, *supra,* § 2491; for "presumptions . . . may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts." Stumpf v. Montgomery, 101 Okl. 257, 226 P. 65 (1924).

The primary input of the attorney to his client's case is that of professional expertise. Even in a simple criminal case, meticulous investigation and thoughtful legal analysis will often reveal a panoply of issues—to which the defendant, a layman, will be oblivious. Both our approach and that of the Third and First Circuits require an inquiry into whether counsel has adequately considered the facts of the case and explored the various avenues of defense. Usually

the result of the two approaches will coincide. The value of our own rule is in those relatively rare situations where because of passage of time or the unavailability of material witnesses, a defendant can show late appointment and no more. In such cases, it comports with notions of fair play to expect the state, with its greater resources, to bear the burden of demonstrating regularity, especially since a court of the state, not the defendant, produced the unhappy situation by originally making the late appointment.

[2] Where a petitioner demonstrates late appointment of counsel, we will continue to employ the presumption of ineffective assistance of counsel, remembering that it is merely a procedural device dictating a particular result only in the absence of contradictory evidence. The moment that contravening evidence is presented from any source, the presumption vanishes completely—as if it had never existed. Our continued adherence to a rule of presumption of prejudice avoids potential injustice in a case such as the one before us today. Garland's attorney is dead, and all concede that it is now impossible to properly determine the adequacy of his representation of the client. If we accorded, as would the Third Circuit, a presumption of regularity to the conduct of Garland's attorney, we would be closing all avenues of appeal to the petitioner. It is more probable and more fair to presume that fifteen to twenty minutes' preparation time resulted in ineffective performance of counsel.

Reversed.

APPENDIX B

EDWARD G. GARLAND, Petitioner,

v.

J. D. COX, Superintendent, Virginia State Penitentiary, Respondent.

Civ. A. No. 70-C-4-H.

United States District Court,
W. D. Virginia,
Harrisonburg Division.
April 29, 1970.

Habeas corpus proceeding by state prisoner. The District Court, Dalton, Chief Judge, held that state prisoner, whose claim of ineffective representation of counsel was not presented until almost 15 years after conviction, and after death of his counsel, would not be allowed to make out a prima facie case of ineffective representation of counsel by showing late appointment of counsel, and would be required to carry burden of proving prejudice due to the late appointment of counsel.

Petition dismissed.

1. Habeas Corpus—30(3)

Fully served forgery convictions could be attacked by state prisoner who was serving recidivist sentence founded thereon.

2. Criminal Law—641.13(2)

A prima facie case of ineffective representation of counsel is made by showing late appointment of counsel.

3. Criminal Law—641.13(2)

Where record contains adequate affirmative proof that the petitioner was not prejudiced despite lack of time for preparation, the court will not find a denial of effective representation of counsel.

4. Criminal Law—660

An unreasonable and unjustified delay by a petitioner in making a claim of ineffective representation of counsel may not be used to disadvantage of the state.

5. Habeas Corpus—85.2(2), 85.5(11)

State prisoner, whose claim of ineffective representation of counsel was not presented until almost 15 years after conviction, and after death of his counsel, would not be allowed to make out a prima facie case of ineffective representation of counsel by showing late appointment of counsel, and would be required to carry burden of proving prejudice due to the late appointment of counsel.

6. Habeas Corpus—85.5(11)

State prisoner, who did not raise any factual allegations which showed that counsel needed more time to prepare defense, who did not deny being a party to crimes, whose only defense was that he did not know whether he or his coconspirator did actual forging of particular checks, and who offered no mitigating circumstances with regard to these crimes, failed to carry burden of proving prejudice due to late appointment of counsel.

W. Luke Witt, Asst. Atty. Gen., Richmond, Va., for respondent.

OPINION and JUDGMENT

DALTON, Chief Judge.

This case comes before the court on a petition for a writ of habeas corpus filed *in forma pauperis* by Edward G. Garland, a state prisoner, pursuant to 28 U.S.C. § 2241. The petition was originally filed in the United States District Court for the Eastern District of Virginia and was transferred to this court by order filed March 6, 1970.

[1] Petitioner attacks a judgment of the Circuit Court of the City of Waynesboro imposed on November 14, 1955, wherein he was convicted on five counts of forgery. Petitioner has fully served these sentences and is currently serving a recidivist sentence of nine years. Petitioner may attack these fully served forgery convictions because the recidivist conviction is founded thereon. Cf. Tucker v. Peyton, 357 F.2d 115 (4th Cir. 1966).

Petitioner has exhausted his available state remedies in compliance with 28 U.S.C. § 2254. No appeal was taken from these convictions. On May 28, 1968, he did file a petition for a writ of habeas corpus in the Circuit Court of the City of Waynesboro. The writ was denied and dismissed. On December 3, 1969, the Virginia Supreme Court of Appeals affirmed that judgment.

In the present petition, only one claim is made. Petitioner alleges a denial of effective representation of counsel arising from counsel's appointment on the day of trial.

The record shows that counsel was in fact appointed on the day of trial. Petitioner alleges that counsel discussed the case with him for 15 to 20 minutes. Due to the death of counsel, the record does not disclose any action counsel took on behalf of petitioner.

[2, 3] A prima facie case of ineffective representation of counsel is made by showing late appointment of counsel. Fields v. Peyton, 375 F.2d 624 (4th Cir. 1967); Twiford v. Peyton, 372 F.2d 670 (4th Cir. 1967). But where the record contains adequate affirmative proof that the petitioner was not prejudiced despite the lack of time for preparation, the court will not find a denial of effective representation. Fields v. Peyton, *supra*. The state's best evidence for rebutting this prima facie case would be through the testimony of the petitioner's counsel. Counsel had the best opportunity to know how strong the evidence appeared

and what defenses were available. His testimony is vital in determining how thoroughly he investigated the underlying evidence. His testimony would also be valuable in demonstrating whether petitioner understood his plea and whether he voluntarily and intelligently gave up any of his rights.

[4] An unreasonable and unjustified delay by a petitioner in making a claim may not be used to the disadvantage of the state. See Wade v. Peyton, 378 F.2d 50 (4th Cir. 1967). The present claim was not presented until almost 15 years after the conviction, and after the death of petitioner's counsel. It is clear that the state has been prejudiced with regard to petitioner's delay in making this claim—its chance for effective rebuttal evidence died with petitioner's counsel.

[5] Petitioner will not be allowed to make out a prima facie case under *Fields* when his lack of diligence removed the possibility of meaningful rebuttal evidence. In these circumstances, the petitioner will be required to carry the burden of proving prejudice due to the late appointment of counsel.

[6] Petitioner has not carried the burden of proving prejudice in the present case. He has not raised any factual allegations which show that counsel needed more time to prepare the defense. He does not deny being a party to the crimes. His only defense was that he did not know whether he or his co-conspirator did the actual forging of particular checks. Petitioner has offered no mitigating circumstances with regard to these crimes.

For the foregoing reasons, it is adjudged and ordered that the petition for a writ of habeas corpus be dismissed and the relief denied.

If the petitioner wishes to appeal this judgment or any part thereof, he may do so by filing with the clerk of *this*

court a notice of appeal. Failure to file the notice of appeal within 30 days may result in a denial of the right to appeal.

The notice shall state the following:

1. The party or parties taking the appeal;
2. The judgment, order or part thereof appealed from; and
3. The court (United States Court of Appeals for the Fourth Circuit) to which the appeal is taken.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 14,820

EDWARD G. GARLAND,

Appellant,

v.

J. D. COX, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Appellee.

ORDER

The petition for rehearing and suggestion for reconsideration in banc of J. D. Cox, Superintendent of the Virginia State Penitentiary, having been read and considered, and

a majority of the judges eligible to vote having voted against rehearing in banc;

It is, with the concurrence of Judge Sobeloff and Judge Thomsen,

ORDERED that said petition be, and it is hereby, denied.

s/ HARRISON L. WINTER
United States Circuit Judge

Filed Mar 1, 1973.

William K. Slate, II, Clerk.

True Copy, Teste:
William K. Slate, II, Clerk

By Sharon Grubb, Deputy Clerk.